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No. 84-578

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

AVTEX FIBERS, INC.,
Petitioner

v.

ROBERT L. MCDOWELL,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner Avtex Fibers, Inc. ("Avtex") respectfully submits the following in reply to two arguments raised in Part I of the Brief for Respondent Opposing Petition for Writ of Certiorari ("Brief for Respondent"), on the question of the appropriate legal standard for the award of liquidated damages under Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b).[1]

1. The arguments offered in Part II of the Brief for Respondent, on deductibility of pension benefits and unemployment compensation benefits from back-pay awards under the ADEA, are essentially those relied upon in the Opinion of the Third Circuit in this case

1. The Brief for Respondent (p. 12) relies upon legislative comments made in 1978, eleven years after passage of the ADEA *with* its liquidated-damages provision.[2] Directly on point is *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Just as in the present case, at issue in *Oscar Mayer* was an ADEA section[3] which was passed in 1967[4] and not amended in 1978.[5] With respect to the legislative comments[6] made in connection with the 1978 amendments to ADEA, this Court stated:

> "We are not persuaded. Senate Report No. 95-493 was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations . . . are in no sense part of the legislative history.' *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977). 'It is the intent of the Congress that enacted [the section], . . . that controls.' *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)." 441 U.S. at 758.[7]

(A-15 to A-21), and were addressed in the Petition for Writ of Certiorari.

2. *See* Act Dec. 15, 1967, P.L. 90-202, 81 Stat. 602. The legislative history cited in the Petition for Certiorari (pp. 15-16) is from the Congress which passed ADEA in 1967. At p. 16 of the Petition, the citation "113 Cong. Rec. 7076 (1976)" is a typographical error; the correct citation is 113 Cong. Rec. 7076 (1967).

3. 29 U.S.C. §633(b).

4. Act Dec. 15, 1967, P.L. 90-202, 81 Stat. 602.

5. Act April 6, 1978, P.L. 95-256, 92 Stat. 189.

6. Senate Report No. 95-493, which was adopted in the Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 95-950, 9th Cong. 2d Sess. 13-14, reprinted in 1978 U.S. Code Cong. & Ad. News, 535 (the same Joint Explanatory Statement relied upon in the Brief for Respondent, p. 12).

7. As to the inutility of subsequent legislative comments, *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980).

ADEA's liquidated-damages provision, 29 U.S.C. §626(b), was passed in 1967 and not amended in 1978. The 1978 legislative observations cited at p. 12 of the Brief for Respondent should not be deemed persuasive.

2. The Brief for Respondent argues at pp. 7-8 that the acknowledged split among the Circuits[8] is immaterial because the jury in this case implicitly found that Avtex had willfully violated the ADEA. No authority is cited to support the proposition that pursuant to the jury instructions in this case, there was such an implicit finding. In an attempt to support that proposition, the Brief for Respondent suggests (pp. 7-8) that the jury in this case necessarily concluded that Avtex's proferred reasons for terminating McDowell were false. Two responses are in order.

First, the Courts in both *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983) and *Golomb v. Prudential Ins. Co. of America*, 688 F.2d 547 (7th Cir. 1982) held that a jury finding of liability, on instructions substantially the same as those in the present case,[9] did *not* amount to a finding that an employer's articulated reasons for the challenged action were false; rather,

> ". . . the employer's articulated reason may in fact have been true, but if age was also a determining factor in the employer's decision, the plaintiff has carried his burden of proof." *Golomb v. Prudential Ins. Co. of America, supra*, 688 F.2d at 551; see also *Hagelthorn v. Kennecott Corp., supra*, 710 F.2d at 82.

Accordingly, in the present case the jury did not necessarily reject the reasons put forward by Avtex[10] for terminating McDowell; they were instructed to find a vio-

8. Brief for Respondent, pp. 5-7.

9. *Compare* J.A. 197-99 with *Hagelthorn v. Kennecott Corp., supra*, 710 F.2d at 80 and *Golomb v. Prudential Ins. Co. of America, supra*, 688 F.2d at 549-50.

10. *See* Petition for Certiorari, pp. 5-6.

lation if they simply found it more likely than not that age "made a difference."[11]

Second, clearly there has never been a factual determination in this case that would satisfy the legal test set forth, for example, in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), where a distinction is drawn (for purposes of determining whether liquidated damages should be awarded) between an "unconscious" violation of the ADEA, and a violation with the intent to violate the ADEA. *Syvock, supra*, 665 F.2d at 155. In the present case where there was no direct evidence of age discrimination,[12] where in fact plaintiff argued "unconscious" age discrimination at trial,[13] and where the jury instructions required no finding as to Avtex's state of mind, the split among the Circuits is most certainly material.

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11. In addition to the jury instructions quoted at p. 8 n.11 of the Brief for Respondent, the jury in this case was instructed:

> "When I say that the plaintiff must establish unlawful age discrimination by a preponderance of the evidence, I mean that he must prove that it is more likely than not that age was a *determinative factor* in the defendant's decision to discharge the plaintiff. In order to be a determinative factor, the plaintiff's age need not be the *only* factor which influenced the defendant's decision to discharge him. It can be one among a number of factors which together caused the defendant to discharge him. However, the plaintiff must prove that it is more likely than not that this age factor made a difference in the defendant's decision to discharge him." (J.A. 198.)

12. *See* Petition for Certiorari, p. 6.

13. *See* Petition for Certiorari, pp. 6-7.

Respectfully submitted,

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